Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-04–114 OF 2005
ABDULL HAMID EMBONG, ABDUL MALIK ISHAK AND KANG HWEE GEE JJCA
14 APRIL 2011

Insurance — Recovery action — Denial of liability by insurer — Fatal accident — Passenger in lorry killed — Negligence of lorry driver — Action for damages by deceased's estate — Lorry owner held fully liable — Deceased not employee of lorry owner but freelance worker — Whether insurer could repudiate liability to pay under policy — Whether finding of liability in civil action prevented insurer from raising liability issue in recovery action

A motor lorry insured by the respondent was involved in an accident in which a passenger ('the deceased') in the lorry was killed. A civil suit ('the liability action') filed in the sessions court found the owner of the lorry ('the company') 100% vicariously liable for the negligence of its driver in the accident and damages was awarded. The appellant then filed a recovery action in the same court to enforce the damages award against the respondent under s 96(1) of the Road Transport Act 1987 ('RTA'). The respondent repudiated liability to pay on the grounds the deceased was a mere passenger in the lorry and not an employee of the company. The respondent relied on an exception of the liability clause in its insurance policy that said the respondent would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment'. The sessions court allowed the appellant's claim but the High Court reversed the decision on appeal holding that under the exception clause the deceased was not in a contract of service with the company. The appellant appealed the decision to the Court of Appeal where it was argued, inter alia, that res judicata barred the respondent in a recovery action from re-litigating the issue of liability which had been determined in the liability action.

Held, dismissing the appeal with costs:

(1) The deceased was not under a contract of service with the company but a mere passenger. The respondent was thus not liable for his death (see para 13).

(2) The deceased was merely a freelance worker whose wages were paid by the cement purchaser at the destination where the cement bags were loaded off the motor lorry. He merely helped the driver unload the cement bags from the lorry and was paid on that basis. Apart from that, the company had no control over the deceased (see paras 10 & 11).

(3) The liability and recovery actions were distinct from each other. The former was founded on tort, to determine negligence; the latter was based on a statutory right under the RTA which included the construction of the terms of the insurance policy and the application of s 91 and s 96 of the RTA. For this reason alone it was unjust to bar the respondent from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue in the recovery action (see paras 20 & 21).

(4) The respondent was not a party in the liability action. Thus a final determination of the issue of liability could not be said to have been made by the trial judge in the liability action (see para 22).

(5) A dogmatic approach in applying the res judicata principle as a bar would be unjust to the respondent who did not have a full and fair opportunity to litigate the issue. This factor must be met before res judicata could be binding on the parties. It was founded on justice and common sense (see para 22).

[**Bahasa Malaysia summary**
Sebuah motolori yang diinsuranskan oleh responden telah terlibat dalam kemalangan yang mana penumpang ('si mati') di dalam lori telah terbunuh. Satu guaman sivil ('tindakan liabliti') yang difailkan dalam mahkamah sesyen mendapati pemilik lori ('syarikat') adalah 100% bertanggungan secara vikarius bagi kecuaian pemandunya dalam kemalangan dan ganti rugi diawardkan. Perayu kemudiannya memfailkan tindakan mendapatkan balik di dalam mahkamah yang sama untuk menguatkuasakan award ganti rugi terhadap responden di bawah s 96(1) Akta Pengangkutan Jalan 1987 ('APJ'). Responden membatalkan liabiliti untuk membayar atas alasan bahawa si mati hanya penumpang lori dan bukan pekerja syarikat. Responden bersandarkan pada pengecualian dalam klausa liabiliti dalam polisi insurans yang menyatakan bahawa responden tidak akan bertanggungan bagi kematian atau kecederaan diri ke atas mana-mana orang 'other than a passenger carried by reason of or in pursuance of a contract of employment'. Mahkamah sesyen membenarkan tuntutan perayu tetapi Mahkamah Tinggi mengakas keputusan rayuan bahawa di bawah klausa pengecualian, si mati tidak berkontrak servis dengan syarikat. Perayu merayu keputusan kepada Mahkamah Rayuan di mana menjadi pertikaian, antara lain, bahawa res judicata menghalang responden dalam tindakan mendapatkan balik dari menglitigasi semula isu liabiliti yang telah diputuskan dan tindakan liabiliti.

Diputuskan, menolak rayuan dengan kos:

(1) Si mati tidak berada dalam kontrak servis dengan syarikat tetapi hanya

A seorang penumpang. Dengan itu, responden tidak bertanggungan ke atas kematiannya (lihat perenggan 13).

(2) Si mati hanyalah seorang pekerja bebas yang gajinya dibayar oleh pembeli simen di tempat beg-beg simen diturunkan daripada motolori. Dia hanya menolong pemandu menurunkan beg-beg simen daripada lori dan dibayar berdasarkan itu. Selain itu, syarikat juga tiada kawalan terhadap si mati (lihat perenggan 10 & 11).

(3) Tindakan liabiliti dan mendapatkan semula adalah berbeza daripada satu sama lain. Tindakan liabiliti adalah berasaskan tort, untuk menentukan kecuaian; tindakan mendapatkan semula adalah berasaskan daripada hak statutori di bawah APJ yang memasukkan pembentukan terma-terma polisi insurans dan pemakaian s 91 dan s 96 APJ. Untuk tujuan ini sahaja, adalah tidak adil untuk menghalang responden daripada membangkitkan isu liabilitinya walaupun hingga ke tahap mengemukakan bukti bagi isu yang sama dalam tindakan mendapatkan semula (lihat perenggan 20 & 21).

(4) Responden bukan pihak dalam tindakan liabiliti. Dengan itu, suatu pemutusan akhir isu liabiliti tidak boleh dikatakan sebagai telah dibuat oleh hakim bicara dalam tindakan liabiliti (lihat perenggan 22).

(5) Satu pendekatan dogmatik dalam menggunapakai prinsip res judicata sebagai halangan adalah tidak adil kepada responden yang tidak mempunyai peluang sepenuhnya dan adil untuk melitigasikan isu tersebut. Faktor ini mestilah dipenuhi sebelum res judicata boleh mengikat pihak-pihak. Ia berasaskan keadilan dan kenyataan munasabah (lihat perenggan 22).]

Notes

For a case on denial of liability by insurer, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 400.

Cases referred to

American International Assurance v Dato Lam Peng Chong & Ors [1999] 2 MLJ 547; [1999] 2 CLJ 771, CA (refd)

Bank voor Handel en Scheepvaart NV v Stratford [1953] 1 QB 248, CA (refd)

Employees Provident Fund Board v MS Ally & Co Ltd [1975] 2 MLJ 89, FC (refd)

Henderson v Henderson (1843) 3 Hare 100 (refd)

Kuala Lumpur Mutual Fund Bhd v J Bastian Leo & Anor [1988] 2 MLJ 526, SC (refd)

Legislation referred to

Road Transport Act 1987 (RTA) ss 91, 96, 96(1)

Appeal from: Civil Appeal No 12–29 of 2001 (High Court, Taiping)

Selvadoray a/l Thandanyan (T Selva & Co) for the appellants.
Lim Kim Guan (Hor Sook Yin with him) (Lim Him Wee & Co) for the respondents.

Abdul Hamid Embong JCA (delivering judgment of the court):

[1] On 30 January 1996, a road accident happened involving motorlorry No WT 1835 belonging to Syarikat Jagoh Angkat Sdn Bhd which was driven by one Katurajah a/l Subramaniam. Riding as a passenger with him was one Kanisan a/l Gopal ('the deceased'), who died in that accident. The motorlorry was insured by the respondent in this appeal (now referred to as P&O).

[2] A civil suit which we now refer to as the 'liability action' was filed at the Taiping sessions court, which after a full trial found the defendant, ie Kumpulan Jagoh Angkut Sdn Bhd to be 100% vicariously liable for the negligence of its driver Katurajah.

[3] Upon appeal against that decision, in the liability action, the High Court dismissed the appeal against liability but reduced the initial quantum of RM74,100 general damages and RM1599 as special damages to RM52,899.50.

[4] The appellant next filed a separate action, ie GS 52–97 of 2001 ('the recovery action') against P&O as the insurers. This recovery action was filed pursuant to s 96(1) of the Road Transport Act 1987 ('RTA'). P&O in its defence stated that the coverage is subject to the terms and condition of its insurance policy. It was P&O's case that the deceased was a mere passenger and not in the employment of Kumpulan Jagoh Angkut Sdn Bhd. The liability clause in the policy had stated that P&O shall not be liable in respect of:

> Death of or bodily injury to any person (*other than a passenger carried by reason of or in pursuance of a contract of employment.*) (Emphasis added.)

It was thus the firm stand of P&O that they cannot be liable pursuant to the exception as stated in the brackets above under the terms of the policy.

[5] On 26 October 2001, the sessions court allowed the appellant's claim under the recovery action.

[6] On appeal by P&O, the High Court reversed that decision and held that P&O cannot be liable in view of the exception to liability under the policy's terms.

[7] The learned High Court judge in coming to his decision to allow the appeal, considered the evidence adduced and found the deceased not to be a person who was in a contract of service with Kumpulan Jagoh Angkut Sdn Bhd. It was against this finding of facts by the appellate judge that this issue is now argued before us.

[8] The relevant passage of the High Court's decision is now reproduced. It says:

> Daripada keterangan SP3 adalah jelas bahawa si mati mempunyai pilihan sama ada mahu bekerja atau tidak. Pemandu lori tidak boleh memaksa si mati mengikutinya sekiranya si mati tidak mahu. Si mati sendiri yang menentukan sama ada ia hendak mengikut pemandu lori tersebut. Menurut SP3 pengangkut simen adalah pekerja bebas (free lance). Mereka datang bekerja mengikut kehendak hati mereka. Pemandu akan hanya mengambil mana-mana pekerja yang menawarkan khidmat mereka. Pemandu menawarkan kerja kepada mereka dan terpulang kepada pengangkut simen ini hendak menerima atau menolak tawaran tersebut.
>
> Pengambil insurans tidak mengawal cara mana si mati perlu melakukan kerjanya. Hal ini ditentukan oleh pembeli simen yang fnembayar upah si mati. Majikan si mati ialah pembeli simen.

[9] The High Court also considered the four indicia for a contract of service to exist as laid down by the Federal Court in *Employees Provident Fund Board v MS Ally & Co Ltd* [1975] 2 MLJ 89 in determining whether, on the facts, the deceased was truly one within Kumpulan Jagoh Angkut Sdn Bhd's contract of service. These are:

(i) The master's power of selection of his servant,

(ii) The payment of wages or other remuneration,

(iii) The master's right to control the method of doing the work, and

(iv) The master's right of suspension or dismissal.

[10] We have critically perused the evidence led especially that of SD2, SP3 and SP2 and find ourselves in agreement with the High Court in deciding that the deceased was not in a contract of service of Kumpulan Jagoh Angkut Sdn Bhd. Most telling is the evidence of SP2, who stated that there would always be a group of persons outside the cement factory waiting to be employed. SP2 said this:

> Ada sekumpulan orang berkumpul di luar kilang berdekatan dengan kedai kopi menunggu mana-mana m/lori yang perlukan khidmat mereka untuk turunkan kampit beg-beg simen di destinasi.

According to uncontradicted evidence of SD2, the wages of the deceased would be paid by the cement purchaser at the destination where the cement bags are loaded off the motorlorry.

In short, these persons' employment was just a temporary ad hoc arrangement. They, including the deceased were merely freelance workers.

[11] It may be observed at this juncture that in the trial of the liability action no specific finding was made by the sessions court whether the deceased was either 'employed' by the driver or was an independent contractor. Be that at it may, we are satisfied from the evidence that the deceased was merely one who helped the driver to unload the cement bags from the lorry and was paid on that basis only. Apart from that, the driver's employer, ie Kumpulan Jagoh Sdn Bhd had no control, a factor, which we say is a relevant consideration, over the deceased as was correctly found by the High Court. We quote two passages from two authorities in determining this issue. In *American International Assurance v Dato Lam Peng Chong & Ors* [1999] 2 MLJ 547; [1999] 2 CLJ 771, this court has stated that:

> A person is a workman if he is engaged under a contract of service. But he is an independent contractor and not a workman if his engagement is pursuant to a contract for services.

The Supreme Court in *Kuala Lumpur Mutual Fund Bhd v J Bastian Leo & Anor* [1988] 2 MLJ 526, said this of control of a workman in one's employment:

> The degree of control exercised by one person over another is always a relevant consideration in determining whether a contract of service exist between them.

[12] The modern test in determining if one is under a contract of service seems to be dependent on whether the person is part and parcel of an organisation, in other words, whether the person is employed as part of the business — (see *Bank voor Handel en Scheepvaart NV v Stratford* [1953] 1 QB 248)

[13] Having considered the evidence we are of the view that the deceased was not under a contract of service of Kumpulan Jagoh Angkut Sdn Bhd. We thus affirm the finding of the High Court on this issue; that the deceased was then a mere passenger, not under such a contract of employment. P&O could thus not be liable for his death.

[14] The second issue raises a point of law which may be stated in this manner:

A Whether in the recovery action the question of liability of the tortfeasor which has been determined in the liability action may still be raised and argued to entitle the insurer to refuse satisfying the judgment.

B **[15]** Learned counsel for the respondent had argued against the relitigation on the liability issue and that the doctrine of res judicata is applicable as a bar.

[16] The appellants' counsel on the other hand, pointed out that the High Court in the recovery action had observed that the sessions court merely made
C a finding that the deceased was a passenger. There was no determination made below if the deceased was an employee to be covered under the policy.

[17] So, is res judicata applicable to bar the issue of liability from being raised again, this time by the insurer?
D

[18] Literally translated, res judicata, is 'the fact has been decided'. It expresses a general public interest policy that the same issue (or cause of action) should not be litigated more than once even if the parties are different. It
E prevents vexatious litigation and any abuse of the courts' process on the premise that final judgments are binding and conclusive (see *Henderson v Henderson* (1843) 3 Hare 100). The criminal law equivalent is the doctrine of double jeopardy.

F **[19]** It is in the broader sense of res judicata that the appellant submitted that the liability issue should now be precluded from being raised at the recovery stage since it has been adjudged in the previous liability action.

G **[20]** It is our view that the liability and recovery actions are distinct from each other. The former is a claim founded on tort whereas the latter is based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the
H recovery action stage.

[21] In the liability action, the issue before the court would be to determine negligence whereas in the recovery action the issues include the construction of the terms in the insurance policy and the application of ss 91 and 96 of the
I RTA. It is upon this construction of the insurance policy that the insurers raised for the first time in the recovery action. In this appeal, P&O, as the insurers is thus seeking to declare that the policy as against the deceased, is unenforceable due to the exception in its terms. This issue remains alive and was brought up on appeal to the High Court and now before us.

[22] It needs to be mentioned that P&O was not a party in the liability action. Thus, a final determination of this issue cannot be said to have been made by the trial judge in the liability action. A dogmatic approach applying the res judicata principle as a bar would be most unjust to P&O who does not have a full and fair opportunity to litigate the issue. This factor must be met before res judicata can be binding on the parties. It is founded on justice and common sense.

[23] For these reasons, we would dismiss this appeal with costs fixed at RM10,000 to the respondent.

Appeal dismissed with costs.

Reported by Ashok Kumar